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|--------------------------------------------------|---|----------------------|
| <b>JEFFERY NICHOLS</b>                           | ) |                      |
| Claimant                                         | ) |                      |
|                                                  | ) |                      |
| VS.                                              | ) |                      |
|                                                  | ) |                      |
| <b>QUALITY EXCAVATION &amp; CONTRACTORS, LLC</b> | ) |                      |
| Respondent                                       | ) | Docket No. 1,036,974 |
|                                                  | ) |                      |
| AND                                              | ) |                      |
|                                                  | ) |                      |
| <b>FIRST COMP INSURANCE</b>                      | ) |                      |
| Insurance Carrier                                | ) |                      |

Respondent urges the Board to affirm the ALJ's Order in all respects. In the alternative, respondent argues that if an assault occurred, claimant was not employee at the time and therefore, the Act does not apply.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges he sustained an assault at the hands of his supervisor Mr. Worrel. Their dispute began around noon on Thursday September 20, 2007 when Mr. Worrel was giving claimant and his coworkers instructions for the rest of the work day. For whatever reason and in response to this direction, claimant tossed or threw the keys to a work vehicle to Mr. Worrel and made some comment that could be construed as an intention to quit work for respondent.<sup>1</sup> Both claimant and Mr. Worrel agree on these facts. Beyond this point, the parties' stories vary dramatically.

Mr. Worrel testified that claimant left the job site for the rest of the day. Mr. Worrel called the company's owner, Mr. Prichard, and informed him of this development. Mr. Prichard told Mr. Worrel to find two other individuals to work and when, or if, claimant returned to the site, to tell him to return on Monday and the three of them would talk. At this point, both Mr. Worrel and Mr. Prichard believed claimant had quit working for respondent. The fact that Worrel and Prichard spoke on this day is corroborated by cell phone records. And Mr. Worrel testified that he had been experiencing problems with claimant for two weeks before this incident and he believed claimant was appearing for work "high as a kite."<sup>2</sup>

Claimant testified that although he was mad and tossed the keys to Mr. Worrel, he nonetheless returned from lunch to the job site and performed work on the afternoon of September 20, 2007.<sup>3</sup> This is not corroborated by witness testimony. Claimant's time sheets indicate that he began working on September 20, 2007, but there is no indication of an ending time of his work day. It is, however, uncontroverted that September 20, 2007 was claimant's last date he was compensated for working.

In January 2008, claimant testified to a somewhat different series of events. When asked during his deposition, he testified that he never left the site following his verbal exchange with Mr. Worrel on the 20th. Instead, claimant explained that he "sat around up

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<sup>1</sup> It must be noted that claimant suffers from Schizophrenia, a condition that predates claimant's work for respondent. However, claimant maintains that he has this condition under control.

<sup>2</sup> P.H. Trans., Resp. Ex. C at 4 (Police Report-Mr. Worrel's statement).

<sup>3</sup> *Id.* at 16.

there on the job site and walked around quite a little bit. It's a nature preserve, I may say, state park."<sup>4</sup>

The next day, September 21, 2007, claimant appeared at the work site. Mr. Worrel approached claimant and explained that he had already hired others to take his place. Mr. Worrel denies ever touching claimant at any point during this discussion. But both men agree words were exchanged and claimant seems to concede he was less than respectful to Mr. Worrel. Claimant then says their discussion escalated as follows:

He [Mr. Worrel] says, "I'm tired of babysitting you." I said, "I'm tired of babysitting all of you," referring to the day before where he took his machine and literally tore a hose and had no regard to it even though it was there, a tool, and at that point in time he punched me in the forehead leaving four fingerprints across my forehead, as I brought my arms up like this - - (indicating) - - and he jerked his right arm back in pain. He brought his left arm as a hammer and apparently his watch caught the end of my radius. My feet were running, but I hadn't turned yet. I got in my truck. I was so traumatized at the time that I forgot to stop at Randolph to get gasoline. I was trying to get my phone to work to call the owner, so I hitchhike down the street and get my gas and come back and put it in my truck, and I'm getting to where my phone works and I call Mr. Prichard and he states I'll keep you on separate jobs.<sup>5</sup>

Mr. Prichard confirms that claimant called him on September 20, 2007 after the incident with Mr. Worrel and further testified that claimant explained that it was all a misunderstanding and that he wanted his job back. Mr. Prichard was on vacation and told claimant to meet him on Monday the 24<sup>th</sup>. Mr. Prichard further testified that he received no phone calls from claimant on the 21<sup>st</sup> the day the assault is alleged to have occurred.

The next day, September 22, 2007, claimant went to the police station and filed a report. Claimant also went to the emergency room and was given a C collar and a sling for his wrist. Claimant complains of problems with his right arm and emotional distress as a result of the altercation. He has been seen by Dr. Jeanne Frieman who has diagnosed Schizophrenia and post traumatic stress disorder, both of which preexisted this event. Nonetheless, she opined that he "is showing additional memory deficit because of this cranial injury due to the assault on September 21, 2007. His emotional condition is long standing; however, the assault may have caused additional paranoia. He requires a guardian and conservator to make provisions for him to live safely with proper housing, food, electricity, heat, and water, and get the medical attention he needs."<sup>6</sup>

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<sup>4</sup> *Id.*, Resp. Ex. D at 29-30 (Claimant's Discovery Deposition-- Jan. 2, 2008).,

<sup>5</sup> P.H. Trans. at 19-20.

<sup>6</sup> *Id.*, Cl. Ex. 1 at 5 (Dr. Frieman's Psychology Report dated Oct. 9, 2007).

The ALJ considered all of the evidence and concluded as follows:

The Court is unable to accept claimant's contention that he was assaulted by Mr. Worrel on the job. Claimant's version of the events are not corroborated by any medical evidence, testimony of others and is implausible.

While the Court recognizes that claimant is in need of treatment for a mental illness, it is not respondent's responsibility to pay for such treatment under the Kansas Workers Compensation Act.<sup>7</sup>

Thus, the ALJ concluded that claimant failed to meet his burden of showing that he sustained personal injury by accident arising out of and in the course of his employment with respondent.<sup>8</sup>

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

This member of the Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed respondent's witnesses over the claimant's testimony. The Board has, in the past, concluded that some deference may be given to the ALJ's findings and conclusions under these circumstances.

This Board Member has reviewed the entire record and concludes the ALJ's Order should be affirmed. Claimant's recitation of the events does not ring true. Not only has claimant been inconsistent in his recitation of the events immediately following the September 20, 2007 verbal exchange between himself and Mr. Worrel, his actions immediately following the alleged assault on September 21, 2007 are wholly implausible. Like the ALJ, this Board Member understands claimant is in need of psychiatric treatment. But based on this record, this Member cannot find that any assault occurred on that date. Thus, respondent is not responsible for providing such treatment. Accordingly, the ALJ's Order is affirmed.

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<sup>7</sup> ALJ Order (Sept. 18, 2008) at 1-2

<sup>8</sup> *Id.* at 1.

In light of the foregoing, respondent's argument on that claimant was not an employee as of September 21, 2007 is moot.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>9</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated September 18, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>9</sup> K.S.A. 44-534a.